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IN THE

Supreme Court of the United States

October Term, 1964
No. 294

ONE 1958 PLYMOUTH SEDAN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does petitioner have the right of return of contraband seized by State Authority and forfeited pursuant to State Statutes?

2. Is the question of reasonable cause for search and seizure before the Court for review?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following additional Constitutional and Statutory Provisions apply in the instant case:

The Twenty-first Amendment to the Constitution of the United States provides in Section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, as amended, Purdons Pennsylvania Statutes Annotated, Title 47, provides in pertinent part as follows:

Section 4-491:

"It shall be unlawful—

> "(2) For any person, except a manufacturer or the board or the holder of a sacramental wine license or of an importer's license, to possess or transport any liquor or alcohol within this Commonwealth which was not lawfully acquired prior to January first, one thousand nine hundred and thirty-four, or has not been purchased from a Pennsylvania Liquor Store or in accordance with the board's regulations. The burden shall be upon the person possessing or transporting such liquor or alcohol to prove that it was so acquired. . . ."

"(4) For any person, except a manufacturer or the board or the holder of an importer's license, to have or keep any liquor, except wine, within the Commonwealth unless the package (except the decanter or other receptacle containing liquor for immediate consumption) in which the liquor is contained while containing that liquor bears the official seal of the board as originally affixed in accordance with the provisions of this act or the regulations of the board. . . ."

Section 6-601:

"No property rights shall exist in any—vehicle—used in the illegal transportation of liquor, alcohol or malt or brewed beverages and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the [Liquor Control] board, be instituted in the manner hereinafter provided. . . ."

Section 6-602(a):

"(a) The proceedings for the forfeiture or condemnation of all property shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant. . . ."

Section 6-603:

". . . . if it appears that any vehicle . . . was so used in the illegal manufacture or transportation of liquor, alcohol, or malt or brewed beverages, such property may in the discretion of the court, be adjudged forfeited and condemned. . . ."

STATEMENT OF THE CASE

On December 16, 1960 at 6:30 a.m. two enforcement officers of the Pennsylvania Liquor Control Board stopped a 1958 Plymouth sedan in Philadelphia, Pennsylvania, and found in the rear of the car and in the trunk 375 bottles of liquor and wine not bearing the official seal of the Pennsylvania Liquor Control Board (R. 5). The officers seized the car and liquor. The Commonwealth of Pennsylvania filed petitions for forfeiture of the car and the liquor in the Court of Quarter Sessions of Philadelphia County and, after hearing, the trial judge dismissed the petition for forfeiture of the automobile but upheld the forfeiture of the liquor (R. 2, 3).

The Commonwealth of Pennsylvania appealed to the Superior Court of Pennsylvania which reversed the lower Court and ordered that the 1958 Plymouth sedan be forfeited and condemned (R. 24).

The owner of the car then appealed to the Pennsylvania Supreme Court, which affirmed the forfeiture decreed by the Superior Court, but based its decision on grounds other than those stated in the opinion of the Superior Court. The Pennsylvania Supreme Court held that since the legislature has declared no property rights to exist in any automobile used in the illegal transportation of liquor the same is contraband. The Court affirmed the order of forfeiture and condemnation of the said automobile (R. 34).

The petitioner thereupon petitioned Your Honorable Court for a Writ of Certiorari which was granted (R. 37).

The records in the proceedings before all courts reveal:

> "On December 16, 1960 two enforcement officers of the Pennsylvania Liquor Control Board were stationed on the Admiral Wilson Boulevard in New Jersey, the approach to the Benjamin Franklin Bridge leading into Philadelphia, Pennsylvania. At 6:30 a.m. on the above date the officers saw a black Plymouth four-door sedan, bearing Pennsylvania registration plates, approaching the bridge. The car was quite low in the rear and the officers followed the car across the bridge into Philadelphia and on Vine Street, west of Sixth Street, in Philadelphia, the officers stopped the car, identified themselves and questioned the operator, George McGonigle. In the rear of the car and in the trunk the officers found 375 bottles (31 cases) of high priced whiskey and wine not bearing Pennsylvania tax seals. The operator of the car, McGonigle, stated to the officers that he had been hired to deliver this liquor from Margate to Philadelphia for $30.00, that he knew it was unlawful but took the chance. McGonigle made no objection to the search of the automobile. The car and liquor were seized and McGonigle was arrested. The officers had neither a search nor a body warrant."

SUMMARY OF ARGUMENT

The automobile, the subject herein, is contraband. At the time of its seizure in Pennsylvania, it contained 375 bottles of liquor which did not bear the seal of the Pennsylvania Liquor Control Board which were being transported within Pennsylvania. Under Pennsylvania law, both the liquor being possessed and transported as well as the vehicle are contraband and the legislature has declared no property right to exist therein.

Pursuant to the Pennsylvania Liquor Code the petition for condemnation of the vehicle is an action in rem, in which the Commonwealth of Pennsylvania is the plaintiff and the vehicle is the defendant. This is not a motion to suppress evidence in a criminal proceeding and the exclusionary rule does not apply. To hold otherwise might require delivery to a claimant of contraband in which the law has declared that no property rights exist.

The Pennsylvania Supreme Court specifically stated that it was not passing upon the validity of the seizure of the vehicle which was condemned as contraband and, therefore, this question is not presented to the United States Supreme Court for review.

ARGUMENT

1. Contraband Which Has Been Seized by the State Should Not Be Returned to Claimant

The Twenty-first Amendment to the United States Constitution prohibits the transportation or importation into any state of the United States for delivery or use therein of intoxicating liquor in violation of the laws of that state. This amendment to the Constitution grants to the states the right to prohibit or to regulate the transportation of intoxicating liquor unlimited by the commerce clause, the equal protection clause and/or the due process clause of the United States Constitution. Your Honorable Court in the *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391, 394 (1944) stated as follows:

> "Since the Twenty-first Amendment, as held in the Young case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and, as held by that case and Mahoney v. Joseph Triner Corp., 304 U. S. 401, discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the State to prevent the sale of intoxicating liquor is undoubted. Mugler v. Kansas, 123 U. S. 623."

See also *California v. Washington*, 358 U. S. 64 (1958).

The Pennsylvania legislature, pursuant to the authority granted to it in the Twenty-first Amendment and in the exercise of its legislative function, enacted legislation which provides that "No property rights shall exist in any . . . vehicle . . . used in the . . . illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and the proceedings for its forfeiture to the Commonwealth may, at the discretion of the [Liquor Control] Board, be instituted in the manner hereinafter provided . . .".

It was pursuant to this Pennsylvania statute, known as section 601 of the Pennsylvania Liquor Code, that the Commonwealth of Pennsylvania instituted an action against the instant vehicle for condemnation and forfeiture of said vehicle.

The action filed was in rem pursuant to section 602(a) of the Pennsylvania Liquor Code which states:

> "The proceedings for the forfeiture or condemnation . . . shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant . . .".

Since the petitioner under the above statutes has no property rights in the subject herein, he therefore has no right to the return thereof.

Your Honorable Court, in the case of *Trupiano v. United States*, 334 U. S. 699, 710; 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), stated as follows:

> "It follows that it was error to refuse petitioners motion to exclude and suppress the property which

was improperly seized. But since the property was contraband, they have no right to have it returned to them."

The Fourth Circuit Court in 1958 reiterates the theory set forth by your Honorable Court in the above case by stating in the case of *United States v. One 1956 Ford Tudor Sedan*, 253 Fed. 2d 725, 726, 727 (4 Cir. 1958), as follows:

> "Legal infirmities in the seizure do not impair the right of the United States to condemn or clothe the former owner with property and possessory rights he lost, when he used the property in violation of the revenue laws. Consideration which in criminal cases require the suppression of evidence obtained in an unlawful search or seizure have no application here."

The United States Court of Appeals for the Third Circuit in *United States v. $1058.00 in United States Currency*, 323 Fed. 2d 211 (1963), held that contraband even though unlawfully seized may nevertheless be forfeited, although it may be suppressed and excluded as evidence in criminal proceedings. It cited with approval *United States v. One Ford Coupe*, 272 U. S. 321, which almost forty years ago set forth the same doctrine where Mr. Justice Brandeis speaking for the Court had said:

> "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized."

Dodge v. United States, 272 U. S. 530, affirmed the reasoning in the One Ford Coupe case and held that the seizure of a boat by an unauthorized person would not preclude the Government from bringing a subsequent action for its condemnation and sale but indicated that the evidence could not be used in a criminal proceeding.

The case of *Cook v. United States*, 288 U. S. 102, cited by petitioner (petitioner's brief p. 20) has no bearing on the matter here at issue as that case concerned the interpretation of a treaty between the United States and a foreign power and did not involve the manner of seizure but the basic lack of power in the Government to make a seizure. In the instant case it is clear that the state has the power to make the seizure but petitioner challenges the manner of exercising the power.

The applicable law promulgated by your Honorable Court and the United States Courts of Appeal was recognized by the Pennsylvania Supreme Court in stating the crux of the question presented for review as follows (R. 31):

> "The Court below refused to decree a forfeiture in the instant case because, inferentially at least, it believed that the rule of exclusion of evidence illegally obtained applied in this proceeding, even though not a criminal proceeding. In this respect the Court erred."

The Pennsylvania Supreme Court disposed of the question by concluding (R. 34):

> "The legislature has seen fit to declare the non-existence of property rights in any automobile used

in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.'"

In reaching this conclusion, the Pennsylvania Supreme Court stated as follows (R. 31):

> "The statute, upon which this proceeding is based, mandates that no property rights shall exist in an automobile used in the illegal transportation of liquor and declares an automobile engaged in such use shall be deemed to be contraband. Articles of contraband are things and objects outlawed and subject to forfeiture and destruction upon seizure: 17 C.J.S. 510. 'It is the use to which the property is put that renders property, otherwise lawful, rightful to have, use and possess, subject to seizure and forfeiture': Hemenway & Moser Co., et al. v. Funk, et al., 100 Utah 72, 106 P. 2d 779. The purpose for which the thing or article is used acts as the criterion for the classification of such thing or article as contraband or non-contraband."

It is apparent that the Federal and State Courts have for good cause distinguished between criminal prosecution and forfeiture proceedings in applying the exclusionary rule.

The reasons for the exclusionary rule in criminal cases do not apply to actions in rem for the forfeiture of contraband. In the one case the prosecutor seeks to invade

a person's privacy to obtain evidence to be used against him. In the other case the Government seeks only to take possession of articles which the law has declared to be contraband in which no property rights exist.

Petitioner seeks to distinguish between "contraband per se" and "derivative contraband" (petitioner's brief p. 20). However, the Twenty-first Amendment to the United States Constitution returns to the several states complete authority and control of intoxicating liquors and the Pennsylvania Liquor Code in section 601 declares that no property rights shall exist in any liquor illegally possessed or in any vehicle used in the illegal transportation of liquor and declares that the same are contraband. The law makes no distinction and, therefore, the liquor illegally possessed and the vehicle used for illegal transportation are both "contraband per se". It is the use to which the property is put that renders property, otherwise lawful, subject to seizure and forfeiture: *United States v. Ryan,* 284 U.S. 167 at 176.

In *Carroll v. United States,* 267 U.S. 132, cited by petitioner, the Court did not pass upon the question of the application of the exclusionary rule in forfeiture cases in rem.

The Pennsylvania Supreme Court (R. 33) cites *United States v. Carey,* 272 F. 2d 492, which points out the proper distinction between obtaining evidence for a criminal prosecution and a seizure of forfeited property and holds that an illegal search and seizure would not defeat the Government's action for forfeiture.

Petitioner cites the case of *Boyd v. United States,* 116 U.S. 616 (petitioner's brief, pp. 12-14) for the proposition

that in criminal prosecutions and civil actions brought by the Government any property seized by officers in violation of the Fourth Amendment is to be excluded from the evidence. However, the issue in the Boyd case concerned the legality of the compulsory production of personal papers for use as evidence. In that case the Government was [redacted] trying to obtain evidence, not the contraband itself and the Court discussed the distinction at page 623:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable', and they are

not embraced within the prohibition of the amendment."

It, therefore, appears that the Boyd case expressly refutes the proposition advanced by petitioner.

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2. The Question of Reasonable Cause for Search and Seizure Is Not Properly Presented for Review

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In affirming the judgment of forfeiture the Pennsylvania Supreme Court Opinion concluded (R. 34):

> "The legislature has seen fit to declare the nonexistence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture."

> "We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding."

As the question of the validity of the seizure has not been determined by the highest court of the Commonwealth of Pennsylvania, it is not before the United States Supreme Court on review; however, respondent submits that considering the totality of circumstances, the search of the vehicle in question was based on reasonable and probable cause.

In the case of *Carroll v. United States*, 267 U.S. 132, at pages 159, 160, it was held that the Court is bound to take notice of public facts and geographical positions. It is general knowledge that liquor consumption rises at the holiday season. Further, it is general knowledge locally that liquor prices are higher in Pennsylvania than in New Jersey and that liquor from New Jersey is illegally brought into Pennsylvania over the Camden, New Jersey-Philadelphia, Pennsylvania bridges.

The incident in this case occurred on December 16, at 6:45 a.m., when the officers might well believe that liquor was being transported into Pennsylvania from New Jersey to meet the heavy demands of holiday trade. The officers observed a car in New Jersey bearing Pennsylvania plates and that the car was riding quite low in the rear. They followed the car over the bridge into Pennsylvania, where they stopped it and found that it contained a large quantity of liquor which did not bear Pennsylvania seals and the driver admitted that he was paid to transport the liquor from New Jersey into Pennsylvania (R. 4-7). The evidence presented by the officers was not contradicted.

The test is that if the facts and circumstances before the officers are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient: *Carroll v. United States* (supra). Certainly what is a reasonable search and seizure is not to be determined by any fixed formula nor is that State Court, in view of the decision of *Mapp v. Ohio*, 367 U.S. 643, prevented from applying its own rather than a federal criteria of "reasonableness" in determining whether a particular

search and seizure was reasonable. Reasonableness of a search must be determined on an ad hoc basis (*Commonwealth v. Bosurgi*, 411 Pa. 56; *Commonwealth v. Cockfield*, 411 Pa. 71).

CONCLUSION

The control of alcoholic beverages has for centuries posed a serious problem for state governments. General recognition of the latent dangers attending unlawful traffic in intoxicating liquors has prompted the adoption of laws designed to curtail such traffic by providing that vehicles used in the unlawful transportation of alcoholic beverages shall be deemed contraband in which no property rights exist. Where such contraband comes into the State's possession it should be decreed forfeited in a civil action in rem brought by the State pursuant to State law. The exclusionary rules of evidence which have been formulated for criminal cases should not apply to such forfeiture proceedings.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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